Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 16 May 2013[1]

Case C-157/12

Salzgitter Mannesmann Handel GmbH
v
SC Laminorul SA

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

(Judicial cooperation in civil matters — Regulation (EC) No 44/2001 — Enforcement of a judgment given in another Member State — Grounds for refusing enforcement — Previous decision from the same Member State in proceedings involving the same subject-matter and cause of action, and between the same parties — Irreconcilable judgments)

1. Must a court from one Member State decline to enforce a judgment given in another Member State if it conflicts with a judicial decision from the latter Member State? This novel question encapsulates, in essence, the dilemma in which the Bundesgerichtshof (Federal Supreme Court, Germany) finds itself.

I – Legal framework

2. Pursuant to Article 45(1) of Regulation (EC) No 44/2001[2] ('the Regulation'), a court hearing an appeal against a declaration of enforceability relating to a judgment from another Member State 'shall refuse or revoke' that declaration only on one of the grounds listed in Articles 34 and 35. In accordance with Article 45(2), the foreign judgment may not be reviewed as to its substance.

3. Article 34 of the Regulation, so far as is relevant here, reads:

'A judgment shall not be recognised:

…

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.'

1 — Original language: English.

2 — Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

4. With effect from 10 January 2015, Article 34(3) and (4) of the Regulation will be replaced by Article 45(1)(c) and (d) of Regulation (EU) No 1215/2012.[3] The wording of these new provisions does not depart in any significant way from the wording of the provisions currently in force.

II – Facts, procedure and the question referred

5. SC Laminorul SA ('Laminorul'), a company established in Romania, brought an action seeking payment for a delivery of steel products against Salzgitter Mannesmann Handel GmbH ('Salzgitter') before the Tribunalul Brăila (Brăila Court of First Instance, Romania).

6. By judgment of 31 January 2008 ('the first judgment'), the Tribunalul Brăila dismissed the action on the grounds that it was not directed against the other party to the relevant contract, Salzgitter Mannesmann Stahlhandel GmbH (formerly Salzgitter Stahlhandel GmbH). That judgment became final.

7. Laminorul initiated new proceedings against Salzgitter before the same court, involving the same cause of action. The application was served on Salzgitter's former Romanian legal representative, whose authority to act for that company had been limited, according to Salzgitter, to the first proceedings. For this reason, no one appeared on Salzgitter's behalf at the hearing arranged by the Romanian court, which proceeded to hand down a judgment by default against Salzgitter on 6 March 2008, requiring Salzgitter to pay EUR 188 330 to Laminorul ('the second judgment').

8. Salzgitter applied for the second judgment to be set aside on the grounds that it had not been summoned in accordance with the relevant statutory provisions in the course of the second set of proceedings. That application was dismissed by the Tribunalul Brăila by decision of 8 May 2008, as Salzgitter had failed to lodge the necessary fee stamps.

9. The second judgment was declared enforceable by the Landgericht Düsseldorf (Düsseldorf Regional Court, Germany) by order of 21 November 2008. Salzgitter appealed against that order.

10. At the end of 2008, Salzgitter also lodged an appeal in Romania seeking annulment of the second judgment, arguing again that Salzgitter had not been summoned to appear at the hearing. That appeal was dismissed as inadmissible by judgment of 19 February 2009.

11. Salzgitter then lodged another appeal to have the second judgment set aside on account of the binding authority of the first judgment. The Curtea de Apel Galați (Galati Court of Appeal, Romania) dismissed that appeal by judgment of 8 May 2009 on the grounds that it was out of time, a decision which was later upheld by the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) by judgment of 13 November 2009.

12. In view of the fact that the legal remedies available in Romania had now been exhausted, the proceedings initiated in Germany for a declaration of enforceability – which had been stayed at the stage of the appeal – were resumed. Salzgitter's appeal against the declaration of enforceability was dismissed as unfounded by the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court, Germany) by order of 28 June 2010.

13. Salzgitter thereupon lodged an appeal on a point of law against the enforceability of the second judgment before the Bundesgerichtshof.

3 — Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ 2012 L 351, p. 1).

14. Having doubts as to the interpretation of Article 34(4) of Regulation No 44/2001, the Bundesgerichtshof decided to stay the proceedings and to refer to the Court the following question:

'Does Article 34(4) of [the Regulation] also cover cases of irreconcilable judgments given in the same Member State (State of origin)?'

15. Written observations have been submitted by Salzgitter, by the German, Spanish, Italian, and Romanian Governments, and by the European Commission. At the hearing on 14 March 2013, oral argument was presented by Salzgitter and by the Commission.

III – Observations of the referring court and the parties before the Court of Justice

16. The referring court considers the ground for refusal under Article 34(2) of the Regulation to be inapplicable in the present case, as Salzgitter had the opportunity to arrange for its defence. It excludes, furthermore, the grounds for refusal under Article 34(1) and (3), as well as those under Article 35. Consequently, in the view of the referring court, the outcome of the proceedings depends on the interpretation of the ground for refusal set out in Article 34(4) of the Regulation. By virtue of Article 45(1), that provision applies to appellate proceedings against a declaration of enforceability.

17. According to the referring court, the first judgment, which dismissed Laminorul's action for payment, and the second judgment, which upheld that action, are irreconcilable. The referring court notes, furthermore, that the first judgment is eligible for recognition in Germany.

18. For those reasons, the Bundesgerichtshof puts forward two different interpretations of the scope of Article 34(4) of the Regulation for consideration by the Court. According to the first line of reasoning, which namely finds support in the wording of the provision, Article 34(4) of the Regulation presupposes a three-State relationship. The exception covers only situations where the Member State addressed is faced with two irreconcilable judgments handed down in two different Member States, or in a Member State and a third State. This interpretation is supported by the Spanish, Italian and Romanian Governments, as well as the Commission.

19. According to the second line of reasoning, the grounds for refusal also apply to a situation involving two irreconcilable judgments handed down in the same Member State (a 'domestic conflict'). This view is based primarily on the perceived scheme and objective of Article 34(3) and (4) of the Regulation. In this respect, Article 34(3) is said to cover cases involving a bilateral conflict of judgments between the Member State addressed and another Member State, whereas Article 34(4) encompasses all the remaining situations where a conflict arises between foreign judgments. This line of argument is supported by Salzgitter.

20. The German Government argues that the Regulation is not suitable for resolving conflicts between decisions which can be resolved on the basis of national law. That government nevertheless submits that in exceptional cases, such as the case before the referring court, in which such a conflict cannot be resolved on the basis of the law of the Member State of origin, Article 34(4) of the Regulation is to apply in order to fill the legal vacuum. This possibility, which Salzgitter supports in the alternative, is also mentioned by the referring court.

IV – Analysis

A – *General remarks*

21. In the same way as for its predecessor, the Brussels Convention,[4] the aim of the Regulation is 'to determine which court has jurisdiction in disputes concerning civil and commercial matters in relations between Member States and to facilitate the recognition and enforcement of judgments'.[5]

22. The rules regulating, on the one hand, jurisdiction, and, on the other, recognition and subsequent enforcement, form the twin pillars necessary in order to achieve the free movement of judgments, which the Regulation seeks to promote.[6]

23. First, rules on international jurisdiction, including special jurisdiction and exclusive jurisdiction, are laid down in Chapter II of the Regulation in order to facilitate cross-border litigation.

24. However, if they were to stand alone, the rules on jurisdiction would be unable to prevent the harmonious administration of justice in the European Union from being disturbed by the launching of multiple proceedings before different *fora* involving the same cause of action. This would run counter to another aim of the Regulation, which is 'to ensure that irreconcilable judgments will not be given in two Member States.'[7]

25. Thus, in order to prevent parallel proceedings before the courts of different Member States and to avoid conflicts between judgments, the rules on jurisdiction in Chapter II of the Regulation are supplemented by the provisions in Section 9 on *lis pendens*. Those rules in turn are designed to preclude from the very outset the possibility that a conflicting judgment may be given.[8]

26. Second, the recognition and enforcement procedures enable a judgment to have the same effect in the Member State addressed as it would have had in the Member State of origin.[9] The enforcement procedure is more specifically laid down in Section 2 of Chapter III of the Regulation.

27. Based on the principle of mutual trust in the administration of justice in the European Union, 'the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid.'[10] Accordingly, once a judgment has been given in a Member State, it is susceptible of enforcement in another Member State 'when, on the application of any interested party, it has been declared enforceable there.'[11] Under Article 41 '[t]he judgment shall be declared enforceable immediately on completion of the formalities in Article 53', that is to say, upon production of a copy of the judgment 'which satisfies the conditions necessary to establish its authenticity' and the standard form listed in Annex V to the Regulation, completed by the court of origin. Article 45(2) prohibits the court addressed from reviewing the foreign judgment as to its substance in the course of that procedure.

4 — Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), as amended by the successive conventions relating to the accession of new Member States to that convention.

5 — Case C-292/10 *G* [2012] ECR, paragraph 44 and the case-law cited.

6 — See recitals 6 and 10 in the preamble to the Regulation.

7 — See recital 15 in the preamble to the Regulation.

8 — See, in respect of Article 21 of the Brussels Convention, Case C-116/02 *Gasser* [2003] ECR I-14693, paragraphs 41 and 42 and the case-law cited.

9 — Case C-139/10 *Prism Investments* [2011] ECR I-9511, paragraph 31.

10 — See recital 17 in the preamble to the Regulation.

11 — See Article 38(1) of the Regulation.

28. Notwithstanding the aforementioned rules on *lis pendens*, irreconcilable judgments are unavoidable – for example, if the court seised is unaware of on-going proceedings initiated at a prior date before a different jurisdiction. Therefore, the Regulation also lays down rules in Article 34 to govern the resolution of such conflicts once a judgment has been given.

29. The first ground for refusal of recognition and enforcement relates to public policy considerations.[12] The second ground for refusal, provided for in Article 34(2), essentially relates to procedural vices leading to possible infringements of the rights of the defence. Lastly, the exceptions under Article 34(3) and (4) both relate to irreconcilable judgments. Whereas, under Article 34(4), the foreign judgment first handed down takes precedence in accordance with the maxim *prior tempore, potior jure*, Article 34(3) of the Regulation allows judgments from the Member State addressed to prevail over judgments from another Member State, irrespective of the dates on which those judgments were handed down.[13]

30. In respect of these exceptions, the Court has held, first, that in order to ensure the free movement of judgments, they must be interpreted narrowly, as they constitute an obstacle to the attainment of one of the fundamental objectives of the Regulation.[14] Second, the exceptions are exhaustive.[15] Third, Articles 34(2), (3) and (4) of the Regulation constitute a *lex specialis* in relation to Article 34(1), which is of a general nature. Therefore, Article 34(1) is inapplicable to the extent that the relevant public policy considerations are addressed by the other exceptions.[16]

31. The above rules do not harmonise or affect the procedural rules of the Member States.[17] More specifically, they do not create additional remedies against national judgments which have become final. All they do is to regulate the effects of conflicting judgments originating from different jurisdictions.

32. Indeed, as was noted by the referring court, rules similar to those laid down in the Regulation exist in the national procedural systems. Rules of that sort may not only prevent domestic conflicts from arising where several actions are brought before different courts within the same Member State (that is to say, national rules on *lis pendens*), but may also afford various remedies against national judicial decisions.[18]

33. For obvious reasons, a judgment given in a Member State can be remedied solely by means of a mechanism available within that Member State, and not through the legal orders of other Member States. Accordingly, the Regulation seeks only to provide a tool for remedying disturbances of the rule of law which cannot be cured at the level of national procedural law. Indeed, a conflict arising from irreconcilable judgments within the same legal order can be addressed by private parties. As domestic remedies already exist, the Regulation does not seek to grant a court from another Member State, namely the Member State addressed, the power to disregard – and therefore effectively to overrule – a judgment from the Member State of origin. Such a power may not even exist under the legal system of the Member State of origin in cases where both judgments have become final.

12 — See Article 34(1) of the Regulation. By virtue of Article 45, the grounds for refusal stated in Article 34 also apply in appellate proceedings against a declaration of enforceability.

13 — See, by way of example, Case 145/86 *Hoffmann* [1988] ECR 645.

14 — See, in relation to Article 34(1) of the Regulation, Case C-619/10 *Trade Agency* [2012] ECR, paragraph 48 and the case-law cited.

15 — *Prism Investments*, paragraphs 33 and 43.

16 — See, in respect of Article 27(3) of the Brussels Convention, *Hoffmann*, paragraph 21, and in respect of Article 34(2) of the Regulation, the Opinion of Advocate General Kokott in *Trade Agency*, point 68. See also the Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1), p. 45.

17 — See, to that effect, *G*, paragraph 44 and the case-law cited.

18 — The Bundesgerichtshof refers in this regard to Paragraph 580(7)(a) of the German Code of Civil Procedure, which provides for a remedy against irreconcilable judgments (subject to observance of the deadline set out in Paragraph 586(1)), and the corresponding provision in Article 322(1)(7) of the Romanian Code of Civil Procedure, to which a similar deadline applies by virtue of Article 324(1).

34. When addressing the enforcement of foreign judgments, it is also necessary to distinguish between the exequatur procedure – that is to say, the procedure for declaring a foreign judgment enforceable – and the actual subsequent enforcement of the foreign judgment. The former procedure seeks to incorporate the foreign judgment in the legal order of the Member State addressed and is wholly governed by the Regulation. The actual enforcement itself, on the other hand, is governed by the national law of that Member State, to the extent that EU legislation does not harmonise the matter. A party may therefore contest the actual enforcement in the same way provided for under national rules in respect of a judgment delivered by the Member State addressed. [19]

35. To sum up, in respect of cross-border disputes concerning civil and commercial matters, the Regulation establishes a comprehensive system governing international jurisdiction, and the recognition and enforcement of judgments. First, it designates the competent court. Second, it prevents courts which are equally competent from hearing the same case as the court first seised. Third, it enables foreign judgments to be recognised and enforced in the same way, as if they had been given in the Member State addressed. Fourth, it provides for remedies in the case of irreconcilable judgments where such a conflict cannot be resolved at the behest of a private party.

36. It is on the basis of these general remarks that the question referred must be answered.

B – *Is Article 34(4) of the Regulation applicable to a situation such as that in the case before the referring court?*

37. Without explicitly questioning the admissibility of the preliminary reference, the Spanish and the Romanian Governments express doubt, as does the Commission, as to whether the first and second judgments are mutually incompatible.

38. On this point, I would emphasise that, in the order for reference, the Bundesgerichtshof states that, in its view, the decisions at issue are irreconcilable and that the first judgment is eligible for recognition in Germany. In preliminary ruling proceedings, it is not for the Court to question the referring court's gathering and appraisal of the facts, as this falls within the competence of the national courts. [20] The Court must therefore answer the question referred on the basis of the information provided by the national court, irrespective of the doubts expressed. Nevertheless, were the Court to concur with the view expressed by the above governments and the Commission, there would seem to me to be a risk that the question referred might be considered purely hypothetical.

39. However, in light of the submissions made during the hearing, I must stress that the decisions cannot be said to be reconcilable merely because the first judgment, dismissing the action, is not enforceable. The grounds for refusal of recognition under Article 34(3) and (4) of the Regulation, to which Article 45(1) refers, do not require both judgments to be enforceable, provided that they entail legal consequences that are mutually exclusive. [21]

40. As to the issue addressed by the question referred, the Court has not yet had the opportunity to interpret Article 34(4) of the Regulation nor has it interpreted the corresponding provision in Article 27(5) of the Brussels Convention. Despite this fact, it is clear to me that a court may not refuse to enforce a judgment from another Member State on the ground that that decision is incompatible with a judgment originating from the same Member State.

19 — See *Prism Investments*, paragraph 40.

20 — See, notably, Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraphs 27 and 32.

21 — By way of example, I refer to Case C-80/00 *Italian Leather* [2002] ECR I-4995. In that case, the judgment of 17 November 1998 of the Landgericht Koblenz (Koblenz Regional Court, Germany), rejecting a request for interim measures, was not enforceable either, in contrast to the order of 28 December 1998 of the Tribunale di Bari (Court of First Instance of Bari, Italy), granting such a request.

41. In my view, that follows from a proper construction of the terms of Article 34(4) of the Regulation.

42. According to the general definition given in Article 32 of the Regulation, the notion of 'judgment' is to be understood as a 'judgment given by a court or tribunal of a Member State' different from the Member State concerned. In the light of that definition, the wording of Article 34(4) of the Regulation can be expanded to the effect that '[a] judgment [given by a court or tribunal of a Member State] shall not be recognised … if it is irreconcilable with an earlier judgment given in another Member State or in a third State'. Accordingly, I agree with the Spanish Government and the Commission that that provision must be understood as referring to a three-State relationship. Consequently, the alternative reading suggested by Salzgitter and the German Government, according to which 'another Member State' in Article 34(4) can be read in conjunction with Article 34(3) as referring to a Member State other than 'the Member State in which recognition is sought', is unsustainable.

43. More importantly, however, it follows – as noted above – from the very system set up by the Regulation that Article 34(4) cannot apply to a 'domestic conflict'.

44. The Regulation does not interfere with the procedural autonomy of the Member States, including the principle of *res judicata*. It ought not to be interpreted as meaning that a court of the Member State addressed may disregard the enforcement of a foreign judgment which is, in any event, open to challenge under domestic rules as being allegedly irreconcilable with a previous judgment from the same Member State. Thus, only to the extent that the parties are unable –owing to the involvement of more than one jurisdiction from different Member States – to challenge a judgment on the basis of its irreconcilability with another judgment, is Article 34(4) of the Regulation to be applicable. As counsel for Salzgitter acknowledged in response to my question at the hearing, Salzgitter had ample opportunity to contest the second judgment in Romania. To interpret Article 34(4) in such a manner as to include 'domestic conflicts' would provide Salzgitter with yet another possibility of overturning the second judgment, in circumvention of national procedural law. Besides, this would produce the same effect as acknowledging a breach of Salzgitter's right to arrange for its defence under Article 34(2), an idea which has been rejected – correctly – by the referring court.

45. Furthermore, I cannot agree with Salzgitter that to exclude 'domestic conflicts' from the scope of Article 34(4) of the Regulation would be problematic inasmuch as one judgment would have to be given precedence over the other. Indeed, the approach which I propose entails that the Bundesgerichtshof must give the second judgment precedence, simply because that judgment is the one which, in the present proceedings, it has been asked to enforce. Were the Court to accept my interpretation, the decision to be taken by the Bundesgerichtshof in the present matter rejecting Salzgitter's appeal would constitute a 'judgment' within the meaning of Article 32 of the Regulation. That judgment would then prevail over the first judgment by virtue of Article 34(3) of the Regulation as it would involve a dispute between the same parties, irrespective of its date of delivery. Thus, the very system set up by the Regulation would require the second judgment, in the case under consideration, to be given precedence.

46. I should add that comparable secondary legislation in the field of judicial cooperation in civil matters seems to confirm my view that the ground for refusal in Article 34(4) of the Regulation presupposes a three-State relationship.

47. Article 21(1) of Regulation (EC) No 805/2004,[22] Article 22(1) of Regulation (EC) No 1896/2006[23] as well as Article 22(1) of Regulation (EC) No 861/2007,[24] all provide that enforcement may be refused in respect of an earlier judgment given in *any* Member State. However, these grounds for refusal are all subject to the proviso that the irreconcilability *was not and could not have been raised* as an objection in the judicial proceedings in the Member State of origin. Therefore, it seems clear that the grounds for refusal under those provisions do not apply to situations where the irreconcilability could have been dealt with internally in the Member State of origin, as in the case before the referring court.

48. Moreover, the provisions of other relevant legal acts[25] refer, in the same way as the Regulation, to 'another Member State' or an expression to that effect. These provisions therefore do not point to an approach other than that outlined above.

49. On a final note, I cannot agree with the view supported by the German Government and Salzgitter, according to which Article 34(4) of the Regulation could nevertheless be applied by analogy (which the German Government refers to as 'exceptional circumstances'). Applying a legal rule by analogy would presuppose a regulatory void.[26] For the reasons mentioned in the initial part of my assessment, it would seem that the present matter is fully covered by the Regulation, leaving it to the legal order of each Member State to resolve situations of 'domestic conflicts'. I am unable, therefore, to discern a lacuna in the Regulation to this effect.

50. For the reasons explained, I take the view that Article 34(4) of the Regulation does not apply to a situation involving two conflicting judgments from the same Member State.

22 — Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15).

23 — Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

24 — Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ 2007 L 199, p. 1).

25 — In this context, I refer to:

(i) Articles 22(d) and 23(f) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1);

(ii) Article 24(d) of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1);

(iii) Article 40(d) of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 2012 L 201, p. 107);

(iv) Article 45(1)(c) and (d) of Regulation No 1215/2012;

(v) Article 34(4) of the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Lugano (OJ 2007 L 339, p. 3) (the Convention uses the term 'another State bound by this Convention'); and

(vi) Article 9(g) of the Hague Convention of 30 June 2005 on Choice of Court Agreements (the Convention uses the term 'another State', available at URL: http://www.hcch.net/).

26 — See, to that effect, Case 165/84 *Krohn* v *BALM* [1985] ECR 3997, paragraphs 13 and 14.

V – Conclusion

51. In light of the above, I propose that the Court answer the Bundesgerichtshof as follows:

Article 34(4) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters does not include the refusal to issue, or the revocation of a declaration of enforceability in respect of a judgment from another Member State which is irreconcilable with an earlier judgment, involving the same cause of action and between the same parties, given in the same Member State as the judgment in respect of which a declaration of enforceability is sought.